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IN THE

## Supreme Court of the United States

OCTOBER TERM, 1994

VARITY CORPORATION,

*Petitioner,*

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON,  
 PATRICK MOUSEL, on Behalf of Themselves and as Rep-  
 resentatives of a Class of Persons Similarly Situated, JOHN  
 ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON,  
 CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS  
 GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and  
 the Estate of WALTER SMITH, individually,

*Respondents.*

On Petition For A Writ Of Certiorari To The  
 United States Court Of Appeals For The Eighth Circuit

## REPLY BRIEF OF PETITIONER

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OCTOBER TERM, 1994

No. 94-1471

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VARIETY CORPORATION,

*Petitioner,*

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON,  
PATRICK MOUSEL, on Behalf of Themselves and as  
Representatives of a Class of Persons Similarly Situated,  
JOHN ALTOMARE, CHARLES BARRON, ALEXANDER  
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On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals For The Eighth Circuit

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**REPLY BRIEF OF PETITIONER**

1. Respondents concede that there is a split in the circuits on the first question presented by the Petition. The Ninth Circuit, they agree, has taken a position flatly at odds with that of the Eighth Circuit in this case. (Opp. 6)<sup>1</sup> Respondents argue only that the division in the circuits is not as substantial as Varsity maintains and that the decision below does not directly

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<sup>1</sup> Citations herein to the Petition are in the form "Pet. \_\_\_"; citations to respondents' Brief in Opposition are in the form "Opp. \_\_\_".

conflict with *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985) or *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993).

As to the latter issue, the Petition does not assert that the decision below directly conflicts with the holdings of either *Russell* or *Mertens*. The reasoning of both rulings, however, leads directly to a reading of § 502(a)(3) that does not permit individual ERISA plan participants to sue on their own behalves for alleged breaches of fiduciary duties. (Pet. 9-13) That, after all, is why Justice Brennan's concurrence in *Russell* was written—to express concern that the Court's legal analysis in that case—analysis that Justice Brennan believed contained conclusions that were “both unnecessary and to some extent completely erroneous”—might be read as barring a private cause of action under § 502(a)(3). *Russell*, 473 U.S. at 155 (Brennan, J., concurring).

That is the very question raised by this case. The Ninth and Eleventh Circuits have followed the approach taken by the *Russell* majority and *Mertens*. (Pet. 14-15) The Third, Seventh and now the Eighth Circuits have ignored completely the analysis of those cases and instead have chosen to follow Justice Brennan's concurrence, rendering both § 502(a)(2) and *Russell* itself all but superfluous. (Pet. 13, 15).

Respondents seek to minimize the magnitude of the split in the circuits by arguing that *Simmons v. Southern Bell Telephone and Telegraph Co.*, 940 F.2d 614 (11th Cir. 1991), held only that there can be no individual claim for breach of fiduciary duty under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1988). Respondents miss the point. In *Simmons*, the court observed that “§ 1109 [ERISA § 409] provides the sole basis for a suit alleging breach of fiduciary duties.” *Id.* at 617. Following *Russell*, the *Simmons* Court explained that “§ 1109 does not permit an individual beneficiary to recover damages for breach of fiduciary duties.” *Id.* Thus, the *Simmons* court read *Russell*—inconsistently with the

Eighth Circuit—to limit fiduciary duty claims to the explicit remedy provided by ERISA §§ 409 and 502(a)(2). As *Russell* held, such claims may only be brought on behalf of a plan.<sup>2</sup>

2. Respondents also avoid the central issue presented by the second question of the Petition. The issue is not whether an ERISA fiduciary “must communicate complete and accurate material information” to plan beneficiaries. (Opp. 12) The question is whether an employer does or does not act *in a fiduciary capacity* when communicating information about internal business decisions that may affect the future provision of benefits. (Pet. 16) The court below found that Varsity acted as a fiduciary under these circumstances (12a-13a), and then determined that a breach had occurred. The split among the circuits arises in connection with the predicate finding (*see* Pet. 16-18), not the subsequent determination.

It is for this reason that respondents' attempt to avoid the circuit split on the Petition's second question fails. Respondents do not even seek to argue that *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988), is anything but directly at odds with the ruling below. (*See* Opp. 10) Instead, they mischaracterize *Young* as an “isolated aberration” in the Seventh Circuit, without acknowledging that the two cases they rely upon do not even address

<sup>2</sup> Respondents also contend that cases from the Sixth and D.C. Circuits “have implicitly recognized an individual right of recovery.” (Opp. 5) Neither case cited by respondents supports their position. *Eddy v. Colonial Life Insurance Co. of America*, 919 F.2d 747 (D.C. Cir. 1990), did not discuss in any way the issue presented here. In *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991), the sole issue was whether monetary damages are available as “equitable relief” under § 502(a)(3). *Warren* is no longer good law after this Court's decision in *Mertens*. As respondents are forced to admit, more recent Sixth Circuit decisions have “indicated that no individual right of recovery for breach of fiduciary duty would be recognized.” (Opp. 5 n.3) (citing *Tregoning v. American Community Mutual Insurance Co.*, 12 F.3d 79 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1832 (1994); *Tassinare v. American National Insurance Co.*, 32 F.3d 220 (6th Cir. 1994)).

the question of when an employer acts in a fiduciary capacity.<sup>3</sup> Respondents assert that *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), does not conflict “directly” with the decision below. (Opp. 12) This ignores the court’s holding that misrepresentations concerning plan assets made during the course of a merger were “statements of intended action [made] in [the company’s] corporate nonfiduciary capacity”, *id.* at 1323 n.28—language that could not conflict more directly with the decision below. Likewise, *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990), was based, as respondents themselves acknowledge, on a finding that “neither the employer nor the union were acting as fiduciaries” (Opp. 11) when they promised—a promise upon which they reneged—to channel benefits to disabled employees. As for *Blaw Knox Retirement Income Plan v. White Consolidated Industries, Inc.*, 998 F.2d 1185 (3d Cir. 1993), misrepresentations concerning a plan’s liabilities were made by the employer during the course of negotiations, and those misrepresentations were the basis of plaintiffs’ breach of fiduciary duty claim. The court rejected the claim because the negotiations were undertaken by the employer in a nonfiduciary capacity. 998 F.2d at 1189.<sup>4</sup>

<sup>3</sup> *Peoria Union Stock Yards Co. Retirement Health Plan v. Penn Mutual Life Insurance Co.*, 698 F.2d 320 (7th Cir. 1983), simply states (as respondents acknowledge (Opp. 10-11)) that “if Penn Mutual was a fiduciary, the alleged misrepresentations” violated ERISA. *Id.* at 326 (emphasis added). *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986 (7th Cir. 1993), is but a restatement of an ERISA fiduciary’s disclosure obligations, and respondents do not suggest that it stands for anything more. (Opp. 11)

<sup>4</sup> Respondents’ assertion that *Blaw Knox* does not reflect the “prevailing rule” in the Third Circuit (Opp. 9-10) is unpersuasive. *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), involved the actions of a pension fund, not an employer; there was (and could be) no issue as to whether the fund wore an employer “hat” and thus no question that the fund acted in a fiduciary capacity. *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993), was decided before *Blaw Knox*.

Respondents’ attempt to draw some sort of distinction between affirmative misrepresentations and omissions is unavailing. Whether characterized as a misrepresentation or an omission, a misleading statement can only breach ERISA’s fiduciary provisions when the person who made the statement was acting in a fiduciary capacity. (Pet. 20-21 & n.10) Respondents’ quoting of statutory language regarding a fiduciary’s “fundamental obligations” (Opp. 13) begs the question.

This Court’s recent decision in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995), confirms that “‘[a] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan’”. *Id.* at 1228 (citation omitted). *Schoonejongen* further confirms that ERISA’s “elaborate”, “core functional” reporting and disclosure provisions constitute the universe of a fiduciary’s information obligations, 115 S. Ct. at 1231, and that ERISA plan beneficiaries “learn their rights and obligations” only through “reliance on the face of written plan documents.” 115 S. Ct. at 1230. (See Pet. 20-21 & nn.9-10)

Respondents do not dispute that the court below found no misrepresentation of plan terms. Nor do they dispute that Varsity informed them in writing of a reservation of rights in 1984—long before their transfer to MCC. Nor, in fact, do they dispute that the court found no violation by Varsity of ERISA’s exhaustive reporting and disclosure requirements. (See Pet. 22) Respondents suggest only that because the court found Varsity to have misled employees regarding MCC’s likely financial viability (therefore potentially affecting their expectation that benefits would remain unchanged), Varsity must somehow have violated the “care, skill, prudence” language of ERISA’s fiduciary provisions. (Opp. 13) But if—as is the case here—these statements were made while Varsity

was acting in its corporate non-fiduciary capacity (Pet. 23-24 & n.12), *a fortiori* there can be no finding of liability.<sup>5</sup>

### CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York  
April 10, 1995

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<sup>5</sup> Respondents' assertion that issuance of the writ is "unwarranted" because the judgment "would nevertheless be sustainable" on alternate theories of liability not reached by the Eighth Circuit (Opp. 14) adds nothing. The court below held that respondents were entitled to equitable relief solely on the basis of the breach of fiduciary duty claim—a claim respondents concede presents a circuit split.